RHB Bank Bhd v FGG Wood Mouldings Industries Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–1233 OF 1997
KANG HWEE GEE J
9 NOVEMBER 2000

Civil Procedure *— Appeal — Appeal from registrar to judge in chambers — Right of parties in interlocutory proceedings to apply to set aside ex parte order — Whether decision should be set aside*

Civil Procedure *— Stay of execution of judgment — Application for — Pending appeal — Neglect of counsel — Appeal would be rendered nugatory and defendant would be made bankrupt if stay not granted, whether good grounds to grant stay*

The plaintiff's appeal against the order of the registrar in setting aside judgment in default obtained earlier by the plaintiff against the fourth defendant was allowed. Consequently the fourth defendant applied to set aside the order. Pursuant to the dismissal of his application to set aside, the fourth defendant applied for a stay of execution of the judgment in default of appearance entered against him pending his appeal to the Court of Appeal. The application was basically grounded in the plea that he had a good defence to the plaintiff's claim, that his appeal if allowed would be rendered nugatory and that the plaintiff had already commenced bankruptcy proceedings against him. It was also argued that an appeal from the decision of the registrar to a judge in chambers heard in the absence of one party could not be set aside.

Held, dismissing the application with costs:

(1) There is indeed no difference between hearing an appeal from the registrar and hearing an application in chambers per se. There is always a right in an interlocutory proceeding for a party to apply under O 32 r 6 of the Rules of the High Court 1980 to set aside an order made ex parte in his absence whether or not the matter before the judge was heard on the merit, and whether or not the matter was an appeal from the decision of the registrar or an application in chambers per se (see pp 91G, 92A); *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; *Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd* [1996] 1 MLJ 30 followed and *Delcont (M) Sdn Bhd v Motor Sport International Ltd & Ors* [1996] 5 MLJ 51 not followed.

(2) A litigant ought not to be allowed to suffer through the neglect of his counsel. But equally compelling is the argument that to set aside the order would tantamount to denying the plaintiff the fruit of a perfectly regular decision considered on the merit, which he was justly entitled to. Nevertheless, the law as it now stands is not in favour of the fourth defendant — the inadvertence of his

counsel to attend to his interest could not constitute a good reason to set aside an order which had been regularly obtained and heard on the merit (see p 93B–C).

(3) There was no ground whatsoever upon which this court could exercise its discretion to grant a stay. The fact that the defendant could not afford to pay the judgment debt and that the order if not set aside would made him a bankrupt, were hardly factors that ought to be considered. Neither could his appeal be rendered nugatory, for the judgment and any bankruptcy order that may follow were clearly not orders that are irreversible (see p 96C–D); *Re Khong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Khong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 followed.

[Bahasa Malaysia summary

Rayuan plaintif terhadap perintah pendaftar mengetepikan penghakiman ingkar telah diperolehi terlebih dahulu daripada plaintif terhadap defendan keempat telah dibenarkan. Akibatnya defendan keempat telah memohon untuk mengetepikan perintah tersebut. Berikutan penolakan permohonan beliau untuk penepian, defendan keempat telah memohon untuk satu penggantungan pelaksanaan penghakiman ingkar kehadiran dimasukkan terhadap beliau sementara menunggu rayuan beliau ke Mahkamah Rayuan. Permohonan tersebut secara umumnya diasaskan dalam pli bahawa beliau mempunyai satu pembelaan yang baik terhadap tuntutan plaintif, bahawa rayuan beliau jika dibenarkan akan menyebabkan ia tidak berguna dan bahawa plaintif telahpun memulakan prosiding kebangkrapan terhadap beliau. Juga dihujahkan bahawa rayuan daripada keputusan pendaftar kepada hakim dalam kamar yang didengar dalam ketiadaan satu pihak tidak boleh diketepikan.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Memang tiada perbezaan antara perbicaraan satu rayuan daripada pendaftar dan perbicaraan satu permohonan dalam kamar per se. Terdapat hak dalam prosiding interlokutori untuk satu pihak memohon di bawah A 32 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk mengetepikan perintah yang dibuat ex parte semasa ketiadaan beliau sama ada atau tidak perkara yang di bawa ke hadapan hakim telah didengar atas merit, dan sama ada atau tidak perkara tersebut adalah satu rayuan daripada keputusan pendaftar atau satu permohonan dalam kamar per se (lihat ms 91G, 92A); *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; *Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd* [1996] 1 MLJ 30 diikut dan *Delcont (M) Sdn Bhd v Motor Sport International Ltd & Ors* [1996] 5 MLJ 51 tidak diikut.

(2) Seorang litigan tidak sepatutnya dibenarkan terjejas akibat kecuaian peguam beliau. Tetapi apa yang sama-sama menarik adalah hujah bahawa untuk mengetepikan perintah tersebut akan sama seperti menafikan plaintif hasil satu keputusan yang biasanya sempurna yang telah dipertimbangkan atas merit, yang beliau sememangnya layak menerima. Namun begitu, undang-undang seperti yang sekarang ini terpakai tidak menyebelahi defendan keempat — kelalaian peguam beliau untuk memberikan perhatian kepada kepentingan beliau tidak boleh membentuk satu sebab yang baik untuk mengetepikan perintah yang biasanya diperolehi dan didengar atas merit (lihat ms 93B–C).

(3) Tiada alasan apa sekalipun yang mahkamah ini boleh gunakan budi bicaranya untuk membenarkan satu penggantungan. Hakikat bahawa defendan tidak mampu membayar hutang penghakiman dan bahawa perintah tersebut jika tidak diketepikan akan menjadikan beliau seorang bangkrap, tidak langsung merupakan faktor-faktor yang sepatutnya dipertimbangkan. Maupun rayuan beliau boleh dianggap tidak berguna, kerana penghakiman tersebut dan mana-mana perintah kebangkrapan berikutnya dengan jelas bukan perintah-perintah yang tidak boleh ditarik balik (lihat ms 96C–D); *Re Khong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Khong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 diikut.]

Notes

For cases on appeal from registrar to judge in chambers, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 583–585.

For cases on stay of execution, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5459–5499.

Cases referred to

Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed [1974] 1 MLJ 58 (refd)

Delcont (M) Sdn Bhd v Motor Sport International Ltd & Ors [1996] 5 MLJ 51 (not folld)

Evans v Bartlam [1937] AC 473 (refd)

Ismail bin Savoosah & Ors v Hejee Ismail (1889) 4 Ky 453 (refd)

Khong Thai Sawmill (Miri) Sdn Bhd, Re; Ling Beng Sung v Khong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 13 (folld)

L'Estrange v F Graucob Ltd [1934] 2 KB 394 (refd)

Loo Chay Meng v Ong Cheng Ho (Gamuda Sdn Bhd, garnishee) [1990] 1 MLJ 445 (refd)

Metropolitan Real and General Property Trust Ltd v Slaters and Bodega Ltd, Regal Property Trust Ltd v Slaters & Bodega Ltd, Freehold & Leasehold Investment Co Ltd v Slaters & Bodega Ltd [1941] 1 All ER 310 (refd)

Monk v Bartram (1891) 1 QB 346 (refd)
Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors [1992] 1 MLJ 73 (refd)
Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (folld)
Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd [1996] 1 MLJ 30 (folld)
Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, Intervener) [1998] 5 MLJ 162 (refd)
Wilson v Church (No 2) (1879) 12 Ch D 454 (refd)
Yeo Yoo Teik v Jemaah Pengadililan Sewa, Pulau Pinang & Anor [1996] 2 MLJ 54 (refd)

Legislation referred to

Federal Court (Civil Appeals) (Transitional Rules) 1963
Rules of the High Court 1980 O 32 r 6

Mohd Hafrizam (*Harjinder Kaur* with him) (*Rashid & Lee*) for the plaintiff.
CK Lee (*Tang & Lee*) for the defendant.

Kang Hwee Gee J:.

(Enclosure 51)

This is an application of the fourth defendant to set aside the order of Steve Shim J (as he then was) allowing the plaintiff's appeal against the order of the registrar in setting aside judgment in default obtained by the plaintiff against the fourth defendant earlier.

The background

The plaintiff bank had by a facilities agreement granted to the first defendant company banking facilities of RM3m. The facilities was secured, inter alia, by the personal guarantee of the second, third, fourth and fifth defendants.

The first defendant defaulted in repayment. The plaintiff sued the first defendant as the principal debtor and the second, third, fourth and firth defendants as guarantors.

The writ of summons were duly served on the first, second, third and fifth defendants. They entered appearance and subsequently filed their defence to the plaintiff's claim.

As for the fourth defendant, however, he could not be located at his last known address. Ultimately, he had to be served with the summons by substituted service, by a notice in the *Malay Mail* and on the notice board of the court.

Having failed to appear on the effective date, judgment in default of appearance was subsequently entered against him by the plaintiff on 15 June 1998.

On 18 November 1998, the fourth defendant applied to set aside the judgment in default of appearance which had been entered against him before the registrar.

On 14 January 1999, the registrar allowed the fourth defendant's application to set aside judgment in default.

The plaintiff appealed against the registrar's decision.

The hearing came before Steve Shim J on 17 January 2000. The fourth defendant's counsel did not turn up. Nevertheless, Steve Shim J proceeded to hear the plaintiff's appeal in his absence. His Lordship allowed the appeal and restored the judgment in default obtained by plaintiff against fourth defendant.

Hence, this application by the fourth defendant (encl 51) to set aside the said order.

The issue

At the heart of this application, is the issue of whether an appeal from the decision of the registrar to a judge in chambers heard in the absence of one party may be set aside.

Counsel for the plaintiff contends that once the judge in chambers had considered the application on the merit by hearing the plaintiff as in this case, his decision cannot be set aside. She/he relied on *Delcont (M) Sdn Bhd v Motor Sport International Ltd & Ors* [1996] 5 MLJ 51, the factual matrix of which appears to be on all fours with the instant case.

In that case, the plaintiff had appealed against the decision of the registrar allowing the defendant to set aside the issue and service of the writ of summons and statement of claim. At the hearing of the appeal to the judge in chambers, neither the defendant nor his counsel was present although the latter had been duly served with the notice of hearing.

Nevertheless, the court proceeded to hear the plaintiff's submission and upon reserving judgment, allowed the plaintiff's appeal.

Upon the defendant applying to set aside the decision, Kamalanathan Ratnam JC (as he then was) held that a party who failed to appear in an appeal to a judge in chambers from the decision of the registrar cannot apply to set aside a decision which had been heard on the merit. His only recourse was to appeal against that decision.

That decision appears to have departed from the established principle in *Loo Chay Meng v Ong Cheng Ho (Gamuda Sdn Bhd, garnishee)* [1990] 1 MLJ 445 read with *Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors* [1992] 1 MLJ 73.

In *Loo Chay Meng*, VC George J held that an inter partes application heard in the absence of a party is an ex parte hearing and on order made therefrom is an ex parte order made in chambers and therefore the court making the order has the jurisdiction to set it aside under O 32 r 6 of the Rules of the High Court 1980 ('the RHC') which provides that:

> The court may set aside an order made ex parte.

A In the subsequent case of *Permata Merchant Bank*, the same judge held that there was a lacuna in the provisions in O 56 of the RHC relating to appeals to a judge in chambers from the decision of the registrar as it failed to make provision for an application to restore an appeal that was struck off without it being heard on account of the appellant having been absent. It held that the court should be free to read into O 56 of the RHC, the B enabling O 32 r 6 of the RHC which provides that the court may set aside an order made ex parte. Alternatively, the court may act under its inherent power to do so.

It is true that *Loo Chay Meng* is concerned with providing an avenue for a party failing to appear at the hearing of an appeal before the judge in C chambers to apply to set aside an order made against him under the more general provision of O 32 r 6 of the RHC as opposed to providing an avenue for a party failing to appear at the hearing of an appeal from the registrar to the judge in chambers under O 56 of the RHC. But the distinction is now no longer of relevance for the Supreme Court in *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 has now held that D in an appeal from a discretionary order of the registrar to a judge in chambers, the judge should exercise his own discretion as though the matter was before him for the first time, unfettered by the previous exercise of the registrars' discretion. It ruled that although the matter before the judge was in form an appeal, it took the shape and style of a rehearing.

E The principle was restated in the Federal Court decision in *Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd* [1996] 1 MLJ 30 where the same judge Edgar Joseph Jr FJ speaking for the panel said at pp 36–37:

> F With respect, in appeals to a judge in chambers from the decision of a registrar of the High Court, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. Such appeals from decisions of the registrar are by way of an actual rehearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the registrar so that rule about new points being not generally open to G an appellant to take on appeal does not apply. In support, we would refer to the following passage in the judgment of Payne J in *Blundell v Rimmer* [1971] 1 All ER 1072 at p 1076; [1971] 1 WLR 123 at p 127.

The two decisions of the highest courts in the land illustrate clearly that there is indeed no difference between hearing an appeal from the registrar and hearing an application in chambers per se. They serve to reinforce and H validate the view expressed by VC George J in *Loo Chay Meng* and *Permata Merchant Bank* that one should read into O 56 of the RHC, (the rules governing appeals to a judge in chambers), of O 3 r 6 of the RHC allowing the court to hear an application to set aside an order made ex parte in the absence of the party making the application.

I On my part, I would not follow the decision in *Delcont (M) Sdn Bhd* in so far as it ruled that the only recourse was for the appellant in the situation described was to appeal. For the reason alluded to earlier, I am of the view

that there is always a right in an interlocutory proceeding for a party to apply under O 32 r 6 of the RHC to set aside an order made ex parte in his absence whether or not the matter before the judge was heard on the merit, and whether or not the matter was an appeal from the decision of the registrar or an application in chambers per se. The nature of O 32 r 6 of the RHC may be better understood by referring to the commentary in *The Supreme Court Practice* 1995 (Vol 1) at 32/1-6/25 which reads:

> By its nature, an ex parte order is essentially a provisional order made by a judge on the basis of evidence and submissions emanating from one side only and there is therefore no basis for making a definitive order and accordingly when the judge reviews his provisional order in the light of the evidence and argument adduced by the opposite party, he is not hearing an appeal from himself and is in no way inhibited from discharging or varying his original oder (per Sir Jon Donaldson MR in *WEA Records Ltd v Visions Channel 4 Ltd & Ors* [1983] 1 WLR 721; [1983] 2 All ER 589 (CA)).

Opening an avenue for an aggrieved party to apply, in my view, provides the refinement of the process by which the judge deal with a given application which he may not have satisfactorily done by hearing only one side of the story. The application to set aside therefore provides the means by which he can review if necessary, his own decision. To quote the notes at p 2255 of the 1998 Desk Edition of the *Malayan High Court Practice*:

> The rule protects the basic right accorded to litigants, that a party who has not had the opportunity of being heard may apply to the court to discharge an order obtained in his absence: *Boyle v Sacker* (1888) 39 Ch D 249 at p 251.

I would not therefore accept the submission of counsel for the plaintiff that the fourth defendant had no right to apply to set aside the decision heard on the merit by Steve Shim J (as he then was) in this application and that his only recourse was to appeal to the Court of Appeal.

But that is not the end of the matter for the fourth defendant.

To succeed, he would still have to satisfy the court that there are valid grounds by the same test formulated by Lord Atkin in *Evans v Bartlam* [1937] AC 473 that had been adopted and applied in our jurisdiction in countless cases. That case is of course concerned specifically with the setting aside of a judgment in default where the case had not been argued on the merit. A fortiori, the same test should be applied to setting aside an interlocutory order heard upon the merit. This was what Lord Atkin said in that case (at p 480):

> The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested, in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there

> were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

There is a compelling argument that a litigant ought not to be allowed to suffer through the neglect of his counsel. But equally compelling is the argument that to set aside the order would tantamount to denying the plaintiff the fruit of a perfectly regular decision considered on the merit, which he was justly entitled to. Nevertheless, the law as it now stands is not in favour of the fourth defendant — the inadvertence of his counsel to attend to his interest cannot constitute a good reason to set aside an order which had been regularly obtained and heard on the merit.

Thus, in *Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58, the Federal Court had to consider whether to allow an application for special leave to file and to serve a notice of appeal out of time under the Federal Court (Civil Appeals) (Transitional Rules) 1963 on the ground of the solicitor's inadvertance to instruct his staff to serve the notice on time. This was what Ali FJ speaking for the Federal Court said at p 59:

> It is necessary to consider whether special leave should be given in this case. The affidavit in support of the notice of motion is that of Mr Foo Say Ghee, the applicant's solicitor. In para 16, Mr Foo Say Ghee said that from 9 February 1973 until 26 March 1973 he was not in a proper and normal state of mind to conduct his office work. This was because he was personally involved in matters which have nothing to do with the applicant's case. In such a state of mind, he said, he inadvertently omitted to instruct his staff to serve the notice on the respondent or the respondent's solicitors. Here, is a clear admission that the failure to serve the notice was due to the solicitor's mistake. Needless to say that such mistake is not a ground for granting special leave. That must be so for the obvious reason that it is not possible to draw a dividing line between a mistake which can support the exercise of a discretionary power and that which cannot. A mistake is a mistake whatever may be the reason for it. As to whether or not Mr Foo's mistake amounts to negligence we express no opinion.

In the more recent Court of Appeal case of *Yeo Yoo Teik v Jemaah Pengadililan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54, the appellant applied for leave to file a notice of appeal out of time on the ground that a new clerk of the appellant's solicitor had allowed the time to lapse for one month. Siti Norma Yaakob JCA (as she then was) speaking for the panel refusing leave, said at p 56:

> The granting or dismissal of an application for the extention of time is very much a discretionary matter but in this instance, the court would not exercise its discretion in favour of the appellant as the omission on the part of a solicitor to be vigilant could hardly be described as an acceptable explanation for the delay.

Finally, in the *Delcont*'s case itself, the failure of counsel to enter the date of hearing in her diary was held to be insufficient ground to set aside an order made after the plaintiff's application was heard on the merit in her absence, following *Chin Hua Sawmill*.

With respect to the merit of his defence, the fourth defendant's application before the registrar was based on two grounds as they appear in his affidavit in support in encl 39.

First, he said he was not aware that the plaintiff had commenced legal proceedings and obtained judgment against him. He was no longer staying in his former address in Taman Melawati having moved to Taman Bandar Baru, Sri Damansara some years back. He became aware of the matter only when a bankruptcy notice pursuant to the judgment was served on him, rightly at his present address.

Secondly, he said he was persuaded by his brother-in-law, Michael Tan Boon Ngee, who was in control of the first defendant company to sign the letter of guarantee as a guarantor for the loan that the company had taken from the plaintiff to buy a factory. He claimed that he did not understand the English language being merely a small trader by occupation.

The service of the writ of summons, it is clear from the affidavit in reply of the plaintiff's bank officer (encl 40) was effected by means of a substituted service by an advertisement in the *Malay Mail* dated 21 May 1998 and by a posting on the notice board of the court. The fourth defendant never disputed the regularity of the substituted service itself. Counsel for the plaintiff was therefore perfectly right in submitting that the place of residence of the fourth defendant was not an issue. The fourth defendant must under the circumstances be deemed to have constructive notice of the issuance of the summons against him, wherever he may have resided.

The claim that he was persuaded to sign the letter of guarantee and that he did not understand the English language it is clear to me, could not have afforded the fourth defendant a viable defence to the plaintiff's claim against him as a guarantor of the first defendant company. The law is clear. In the absence of fraud or misrepresentation a person who signs a document cannot avoid his obligations by simply pleading non est factum. This principle has been applied in countless cases by the English courts notably, in the oft-cited case of *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 wherein the following short passage of the judgment of Scrutton LJ appeared at p 403:

> When a document containing contractual terms is signed, then in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

The principle was brought to our shores over a hundred years ago in *Ismail bin Savoosah & Ors v Hajee Ismail* (1889) 4 Ky 453 at p 458 in the following passage in the judgment of Wood Ag CJ:

> It was argued that the defendant being ignorant of the English language he is to be excused in that account from the performance of his contract, but it is

to my mind clear that in the common principle that govern the law of contract, the person who contracts by a written document, whether or not he understands the language on which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition on objection was authoritatively sustained.

Since then, the principle has been restated and applied in modern times in numerous cases, more recently in *Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, Intervener)* [1998] 5 MLJ 162, wherein at p 173, Abdul Malik Ishak J, applying *L'Estrange* said:

> It is trite law that when a party signs a contract knowing it to be a contract which governs the relations between them, like the present case, then, to use the words of Denning J (as he then as) in *Curtis v Chemical Cleaning & Dyeing Co Ltd* [1951] 1 All ER 631, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.

The fourth defendant fails on both scores. His application must accordingly be dismissed with costs.

(Enclosure 55)

Pursuant to the dismissal of his application to set aside the fourth defendant now applies for a stay of execution of the judgment in default of appearance entered in him pending his appeal to the Court of Appeal.

The application is basically grounded in the plea that he has a good defence to the plaintiff's claim, that his appeal if allowed would be rendered nugatory, that the plaintiff had already commenced bankruptcy proceedings against him, and that he would not in any case be able to satisfy by reason of poverty, the large judgment debt of over RM4,212,232.67 entered against the defendants.

The perimeters within which the court should go about in exercising its discretion whether or not to allow a stay is defined somewhat in the Federal Court case of *Re Khong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Khong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 wherein Lee Hun Hoe CJ, speaking for the panel said:

> Again in *Smith, Hogg & Co Ltd v The Black Sea & Baltic General Insurance Co Ltd* where in dismissing a motion for stay of execution of the order of the Court of Appeal for assessment of damages pending an appeal to the House of Lords, Scott LJ said:
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> > 'The Court of Appeal has had to consider this question some time ago and decided that the practice on appeals to the House of Lords was that stay of execution, pending such an appeal, would not be granted save under very exceptional circumstances, such as for instance, where execution would destroy the subject matter of the action or deprive the appellant of the means of prosecuting the appeal. In our view the appellant's motion is not consistent with the practice on which this court, after consideration, has determined.'

Halsbury's Laws of England (3rd Ed) Vol 16 at p 35 states:

> The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

An appeal which would be nugatory if stay was refused by reason of the poverty of the respondent would be an example of special circumstances. See *Wilson v Church (No 2)* (1879) 12 Ch D 454 (CA). Another example is that payment if a judgment debt would destroy the substratum of the appeal: *Metropolitan Real and General Property Trust Ltd v Slaters and Bodega Ltd, Regal Property Trust Ltd v Slaters & Bodega Ltd, Freehold & Leasehold Investment Co Ltd v Slaters & Bodega Ltd* [1941] 1 All ER 310 (CA), however, an allegation on an appeal that here has been misdirection at the trial would not be sufficient to bring it within the special circumstances: *Monk v Bartram* (1891) 1 QB 346.

It is plain without having to elaborate, that there is no ground whatsoever upon which this court can exercise its discretion to grant a stay. The fact that the defendant cannot afford to pay the judgment debt and that the order if not set aside would made him a bankrupt, are hardly factors that ought to be considered. Neither could his appeal be rendered nugatory, for the judgment and any bankruptcy order that may follow are clearly not orders that are irreversible.

The application is dismissed with costs.

Appeal dismissed with costs.

Reported by Ezatul Zuria Azhari